IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMALIA GONZALEZ-AMEZCUA,

Plaintiff,

v.

MICHAEL J. ASTRUE,

Defendant.

/

No. C 07-03103 JSW

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Now before the Court is Plaintiff Amalia Gonzalez-Amezcua's ("Gonzalez") motion for summary judgment and the cross-motion for summary judgment filed by the Commissioner of the Social Security Administration ("Commissioner"). Pursuant to Civil Local Rule 16-5, the motions have been submitted on the papers without oral argument. Having carefully reviewed the administrative record and considered the parties' papers and the relevant legal authority, and good cause appearing, the Court hereby GRANTS Gonzalez's motion for summary judgment and DENIES the Commissioner's cross-motion for summary judgment.

BACKGROUND

Gonzalez brings this action pursuant to 42 U.S.C. § 405(g) and § 1383(g) to obtain judicial review of a final decision of the Commissioner denying her request for Social Security benefits. Gonzalez is a 42 year old woman, formerly employed as a customer service representative, a data entry clerk, and a telephone order clerk. She claims she became disabled

on August 1, 2000, due to bilateral carpal syndrome and other upper bilateral extremity problems.

On April 17, 2001, one treating physician, Dr. Damore, diagnosed Gonzalez with bilateral carpal tunnel syndrome and bilateral thoracic outlet syndrome. On September 4, 2001, Dr. Damore set limitations of lifting no more than 15 pounds and typing no more than 20 minutes per hour or five minutes consecutively.

On September 17, 2002, Dr. Damore reiterated his limitations set in September 2001, and opined that Gonzalez could achieve substantial gainful employment. (First Administrative Record ("AR1") at 200-01.) On October 18, 2002, the non-examining medical expert, Dr. Newton, opined that Gonzalez could perform sedentary work with limitations on lifting and constant typing. (*Id*. at 219-226.)

On June 11, 2003, an MRI revealed mild disc protrusion in Gonzalez's lower back. (*Id*. at 230.) On November 13, 2003, another treating physician, Dr. Banuelos, opined that Gonzalez's limitations included lifting no more than five pounds and typing no more than 30 minutes consecutively. (*Id*. at 285-291.) He also stated that Gonzalez could sit/stand/walk for only one hour at a time, and that she needed to lie down for three hours during an eight-hour day. (*Id*.)

On August 27, 2002, Gonzalez filed an application for disability benefits. (*Id*. at 60-62.) The Social Security Administration denied her application initially and again upon reconsideration. (*Id*. at 44, 49.) Gonzalez appeared before an Administrative Law Judge ("ALJ") at a hearing conducted on August 5, 2004. (*Id*. at 311-348.)

A vocational expert ("VE") testified at the hearing. (*Id*. at 333-348.) The VE testified that Gonzalez could not perform her past work but had developed transferable skills of customer service work and record-keeping. (*Id*. at 336.) Based on Gonzalez's limitations and skill set, the VE testified that two jobs were appropriate for Gonzalez: security guard and receptionist/information clerk. (*Id*. at 337-38.) Due to Gonzalez's limitations, however, the VE reduced the available number of available jobs in each of these fields by two-thirds. (*Id*.) Even

with the two-thirds reduction, the VE testified that 60,000 security jobs and 40,000 receptionist/information clerk jobs were available in California. (*Id.*)

The ALJ found that although Gonzalez could not perform her past work, she could adapt to other jobs that exist in significant numbers in the national economy and therefore she was not considered disabled. (*Id*. at 19-20.) In making this finding, the ALJ relied in part on the VE's testimony about the types of jobs Gonzalez could perform, found Gonzalez's testimony not to be credible, and rejected the opinion of Dr. Banuelos. (*Id*.) The Social Security Administration denied Gonzalez's request to review the ALJ's decision. (*Id*. at 6.)

Gonzalez obtained judicial review of the final decision of the first denial of her request for Social Security benefits. This Court remanded the decision for further testimony regarding two issues on March 22, 2006. The first issue was whether the two positions proposed by the VE - security guard and receptionist/information clerk - were in fact available to Gonzalez considering the determination by the ALJ that she could only obtain "unskilled" positions. The second issue was whether the determination of Gonzalez's credibility could be supported by specific findings and substantial evidence by the ALJ.

The second administrative hearing upon remand was held on September 26, 2006. During this hearing, the ALJ heard testimony from Gonzalez and from a second VE, who had not testified at the first hearing. Gonzalez testified to many of the same conditions and ailments that she testified to in her original hearing. The VE testified at length about the required abilities for both a security guard and receptionist/information clerk. However, when questioned by the ALJ regarding the skill level of the two positions, the VE stated only that both positions were "un-skilled" without any further explanation or any further questioning by the ALJ regarding the skill level of the positions. (Second Administrative Record ("AR2") at 543.)

On November 22, 2006, the ALJ rendered his decision denying benefits. In the decision, the ALJ stated several reasons for his finding that Gonzalez's testimony regarding her subjective pain level was not credible. First, the ALJ found Gonzalez's "propensity to change her testimony and subjective statements according to the perceived needs of the moment erodes

the full credibility of the claimant's testimony and subjective statements concerning the severity, duration, and limiting effects of her symptoms." (*Id.* at 366.) Second, the ALJ found that Gonzalez's "prescribed medication regimen is not consistent with the complaints of severe persistent and debilitating pain." (*Id.* at 367.) Third, the ALJ found that Gonzalez's testimony was inconsistent between the two hearings regarding her inability to sit for prolonged periods of time. (*Id.*) Fourth, the ALJ found the different subjective complaints made to her doctors and "in materials submitted in connection with her application for benefits . . . further erodes the . . . claimant's credibility." (*Id.*) In accordance with these credibility concerns, the ALJ determined that the original determination of residual functional capacity was accurate.

As stated above, the ALJ made a determination that Gonzalez could only obtain "unskilled" positions. The proposed alternative occupational positions by the VE had a specific vocational preparation ("SVP") time training intensity of 3 in the Dictionary of Occupational Titles ("DOT"). (Br. Exs. A & B.) An SVP of 3 corresponds with the "semi-skilled" work level.[1] However, the VE testified that both proposed positions were of the "unskilled" work level. (AR2 at 540.) The ALJ did not question the VE's classification or ask for an explanation regarding the VE's proffered skill level for the proposed positions. (*Id.*)

In the ALJ's decision, he explained the discrepancy between the second VE's testimony and the DOT regarding the skill level of the proposed positions by stating that "the discrepancy in the sedentary security guard job cluster has greatly expanded since the DOT titles for security guard were published." (*Id.* at 371.) There was no evidence cited to support this conclusion. With respect to the receptionist/information clerk, the ALJ made no findings regarding the skill level required by the position. Based on the ALJ's acceptance of the VE's skill level classification for the proposed positions, the ALJ made a step-five determination that "other work exists in significant numbers in the national economy" that Gonzalez could obtain. (AR2 at 371.) On this basis, the ALJ denied benefits to Gonzalez.

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[1] "The DOT lists a specific vocational preparation (SVP) time for each described occupation. Using the skill level definitions in 20 CFR 404.1568 and 416.968, unskilled work corresponds to an SVP of 1-2; semi-skilled work corresponds to an SVP of 3-4; and skilled work corresponds to an SVP of 5-9 in the DOT." S.S.R. 00-4P. In other words, a higher SVP time corresponds to higher level positions that require increased training time.

In this action, Gonzalez seeks judicial review of the final decision of the Commissioner of the Social Security Administration's finding that Gonzalez was "not disabled" and therefore not entitled to benefits.

ANALYSIS

A. Standard of Review of Commissioner's Decision to Deny Social Security Benefits.

A federal district court may not disturb the final decision of the Commissioner unless it is based on legal error or the fact findings are not supported by substantial evidence. 42 U.S.C. § 405(g); *Sprague v. Bowen*, 812 F.2d 1226, 1229 (9th Cir. 1987). Considering the administrative record as a whole, "[s]ubstantial evidence means more than a mere scintilla, but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). To determine whether substantial evidence exists, courts must look to the record as a whole, considering both evidence that supports and undermines the ALJ's findings. *Desrosiers v. Sec'y of Health and Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). An ALJ's decision must be upheld, however, if the evidence is susceptible to more than one reasonable interpretation. *Gallant v. Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984).

B. Legal Standard for Establishing a Prima Facie Case for Disability.

The disability assessment by the Commissioner follows a five-step sequential evaluation to determine whether a person is disabled. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987); 20 C.F.R. § 416.920. The plaintiff has the burden of establishing a prima facie case for disability in the first four steps of the evaluation.. *Gallant*, 753 F.2d at 1452. However, the Commissioner has the burden of proving the fifth step. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

First, the claimant must not be working. 20 C.F.R. § 416.920(b). Second, the claimant's impairment must be "severe." 20 C.F.R. § 416.920(c). Third, when the claimant has an impairment that meets the duration required and is listed in Appendix 1 (a list of impairments presumed severe enough to preclude work located in subpart P of part 404 of 20 C.F.R. § 416.920), or is equal to a listed impairment, benefits are awarded without considering

the claimant's age, education, and work experience. 20 C.F.R. § 416.920(d). Fourth, if the claimant's impairments do not meet or equal a listed impairment, the Commissioner assesses the claimant's residual functional capacity to determine if the claimant can perform past work. 20 C.F.R. § 416.920(e). Benefits are denied if the claimant can do past work. *Id*. Fifth, if the impairment prevents the claimant from doing past relevant work, the claimant's age, education, work experience, and residual functional capacity are considered to see if the claimant is capable of performing other work that exists in the national economy. 20 C.F.R. § 416.920(g). The claimant is not entitled to benefits if the claimant can adjust to other work. *Id.*

In this matter, the ALJ used the five-step analysis to determine that (1) Gonzalez was not working; (2) her mild carpal tunnel syndrome and mild back problem constituted "severe" impairments; but (3) her impairments did not meet or medically equal the listings in Appendix 1, Subpart P, Regulations No. 4; (4) she was unable to perform her past work; but (5) she had the residual functional capacity to perform a significant range of sedentary jobs that exist in significant numbers in the national economy, namely a security guard or a receptionist/information clerk. (AR2 at 364-72.) Accordingly, the ALJ concluded that Gonzalez was "not disabled." (*Id.* at 372.)

C. The Conflict Between the Vocational Expert's Testimony and the Dictionary of Occupational Titles in the Step-Five Analysis.

Gonzalez contests the step-five conclusion of the ALJ because the testimony of the VE and the DOT conflict in a manner that was not addressed by the ALJ.[2]

> In making disability determinations, the Social Security Administration relies primarily on the [DOT] for 'information about the requirements of work in the national economy.' The Social Security Administration also uses testimony from [VEs] to obtain occupational evidence. Although evidence provided by a vocational expert 'generally should be consistent' with the [DOT], 'neither the [DOT's] nor the [VE's] . . . evidence automatically 'trumps' when there is a conflict.' Thus, the ALJ must first determine whether a conflict exists.

[2] Gonzalez also argues Dr. Damore's residual functional capacity assessment should have been considered in the second administrative hearing. Additionally, Gonzalez argues the ALJ's credibility finding regarding her testimony is not supported by substantial evidence and is not consistent with the relevant standards. The Court does not address Gonzalez's remaining two arguments because the Court's analysis of the first argument forecloses the need to address the remaining arguments asserted by Gonzalez.

Masschi v. Astrue, 486 F.3d 1149, 1153 (9th Cir. 2007) (quoting S.S.R. 00-4P). An ALJ may not rely on the opinion of a VE's "testimony regarding the requirements of a particular job without first inquiring whether the testimony conflicts with the [DOT]." *Id.* at 1153. "When a [VE] . . . provides evidence about the requirement of a job or occupation, the adjudicator has *an affirmative responsibility* to ask about any possible conflict between that [VE's] . . . evidence and information provided in the [DOT]." *Id.* at 1152 (quoting S.S.R. 00-4P) (emphasis in original). To satisfy this responsibility, the ALJ "'*will ask*' the [VE] 'if the evidence he or she has provided' is consistent with the [DOT] and obtain a reasonable explanation for any apparent conflict." *Id.* at 1152-53 (quoting S.S.R. 00-4P) (emphasis in original).

The ALJ in this action did neither. First, the ALJ did not determine whether the VE's testimony that the positions of security guard and receptionist/information clerk were "unskilled" positions was consistent with the DOT. In fact, the occupational positions proposed by the VE for Gonzalez are categorized as "semi-skilled" in the DOT. (Br. Exs. A & B.) Second, the ALJ did not determine if there was a reasonable explanation for the conflict. (AR2 at 543.); *contra Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995) (upholding the ALJ's determination because there was significant testimony regarding how the specific job categories matched the "specific abilities and limitations of the claimant"). As a result, this Court cannot accept the ALJ's decision relying on the VE's testimony that the positions of security guard and receptionist/information clerk are positions Gonzalez can obtain in the national economy. Therefore, there is no "substantial evidence support[ing] the ALJ's step-five finding" that Gonzalez could adjust to other work. *See Masschi*, 486 F.3d at 1154.

D. The Lack of Evidence to Support the Step-Five Finding Warrants a Remand for the Determination and Award of Benefits.

The remedy for an error in the step-five finding is to remand for further factual findings or to remand for benefits. The Court has "discretion to remand a case either for additional evidence and findings or to award benefits." *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989). The Court may direct "an award of benefits where the record has been fully developed and where further administrative proceedings would serve no useful purpose." *Id.* "Such a remand for benefits is indicated particularly where a claimant has already experienced lengthy,

burdensome litigation." *Vertigan v. Halter*, 260 F.3d 1044, 1053 (9th Cir. 2001) (citing *Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990) (remanding for benefits where the claimant had applied almost four years prior)). Furthermore, "[d]elaying the payment of benefits by requiring multiple administrative proceedings that are duplicative and unnecessary only serves to cause the applicant further damage - financial, medical, and emotional. Such damage can never be remedied." *Varney v. Sec'y of Health and Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988). There is no useful purpose in remanding this action for more factual findings when the case has already been remanded for this purpose. Additionally, Gonzalez has already waited six years for her disability determination, and additional proceedings would only delay her receipt of benefits. *See Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996) (holding the claimant "already waited over seven years for her disability determination, and additional proceedings would only delay her receipt of benefits.").

In such instances of delay and hardship, there is a three-part test utilized to determine whether the discretionary remand for award of benefits is warranted:

> In the past, we have credited evidence and remanded for an award of benefits where (1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

Id. (citations omitted). If this test is satisfied, "then remand for determination and payment of benefits is warranted regardless of whether the ALJ *might* have articulated a justification" for denial of benefits if the action was remanded for further proceedings. *Harman v. Apfel*, 211 F.3d 1172, 1179 (9th Cir. 2000) (emphasis in original).

In this case, the ALJ's reasons for crediting and accepting the VE's testimony and rejecting the DOT in the step-five analysis was not sufficient. The ALJ's rejection of the standard DOT definitions of security guard and receptionist/information clerk lacks support in the Administrative Record. The ALJ had the burden of establishing the validity of the VE's opinion by eliciting testimony to support the VE's classification. The ALJ failed to do so at both the first hearing and the hearing upon remand. Because the ALJ had two opportunities to elicit the VE's testimony, the rejected evidence of the DOT classification must be accepted as

true. *See Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1988) (accepting the rejected opinion as true, and ordering the payment of benefits, when there was not substantial evidence to support the finding because the ALJ did not meet its burden of proof by providing specific reasons for disbelieving the treating physician); *see also Sprague*, 812 F.2d at 1230-32 (reversing the decision to deny benefits, in part, because "there are no specific reasons given for disregarding" testimony contrary to the evidence relied on by the ALJ).

There is no evidence to support the rejection of the DOT standards. In accordance with the second requirement for an award of benefits, there are no outstanding issues to be resolved before a determination of "disabled" can be made. In *Vertigan v. Halter*, 260 F.3d 1044, 1053 (9th Cir. 2001), the district court awarded benefits without further administrative proceedings when the claimant's "claim of disability ha[d] been developed by an evidentiary hearing and numerous medical reports." Here, Gonzalez's claim for disability has been developed by two evidentiary hearings and numerous medical reports. *See, e.g., id.* (remanding for an award of benefits when there had only been a single evidentiary hearing, in addition to numerous medical reports). Therefore, examining the record as a whole, this Court finds there are no outstanding issues that must be resolved before a proper disability determination can be made.

The third part of the test for a discretionary award of benefits is also satisfied. A discretionary award of benefits is warranted when it is clear from the record that the ALJ would be required to find the claimant disabled if the evidence not credited by the ALJ were considered. *See Smolen*, 80 F.3d at 1292. If the DOT classification is credited, the fifth step in the ALJ's analysis would change, and Gonzalez would be considered "disabled." Of the two proposed skill levels for the positions proposed by the VE, the Court must accept the DOT's description of "semi-skilled" because there is no evidence to support the VE's testimony regarding the skill level of the two positions. By accepting this definition, there is no available work in the national economy proposed by the VE that is appropriate for Gonzalez and she must therefore be considered "disabled." Thus, by crediting the evidence of the DOT, and not crediting the incomplete testimony of the VE, the third requirement of the test for granting an award of benefits is satisfied.

CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Gonzalez's motion for summary judgment, DENIES the Commissioner's cross-motion for summary judgment and REMANDS FOR AWARD OF BENEFITS. Further proceedings shall be limited to the award of benefits.

IT IS SO ORDERED.

Dated: April 24, 2008

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE